United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1908.

No. 1871 544

No. 10, SPECIAL CALENDAR.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, APPELLANT,

vs.

THE UNITED STATES OF AMERICA ON THE RELATION OF BENJAMIN H. CARTFORD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED FEBRUARY 28, 1908.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 11, 1908.

In the Court of Appeals of the District of Columbia.

No. 1871.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Appellant,
vs.
THE UNITED STATES OF AMERICA on the Relation of BENJAMIN H. CARTFORD.

a Supreme Court of the District of Columbia.

At Law. No. 50028.

THE UNITED STATES OF AMERICA on the Relation of BENJAMIN H. CARTFORD, Petitioner,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Petition.*

Filed December 10, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 50028.

THE UNITED STATES OF AMERICA on the Relation of BENJAMIN H. CARTFORD, Petitioner,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

To the Supreme Court of the District of Columbia:

Your petitioner, Benjamin H. Cartford, respectfully represents:

1. That he is a citizen of the United States and a resident of Codington County, in the State of South Dakota.

2. That the respondent, James Rudolph Garfield, is a citizen of the United States, temporarily residing in the District of Columbia, and is the Secretary of the Interior of the United States, duly qualified

and acting as such and has been such Secretary, and acting as such since March 5, 1907.

3. That your petitioner in the month of February, 1903, and prior thereto, had all the qualifications required by the laws of the United States to entitle him to make an entry of one hundred and sixty acres of the public lands of the United States, under the Act of
2 Congress entitled: "An Act for the sale of timber lands in the States of California, Oregon, Nevada and in Washington Territory," approved June 3, 1878. That having such qualifications, your petitioner did on February 28, 1903, file with the local land officers in their office at Roseburg, Oregon, his timber land sworn statement for the east half of the northwest quarter, and the north half of the northeast quarter of section six, township twenty-five south of range six west of Willamette meridian, in the State of Oregon, a part of the public domain of the United States, and containing one hundred and sixty acres of land. That said land had, prior to the making of said entry by your petitioner, been surveyed, the corners marked, and a plat including the same prepared and filed in the General Land Office; and said land was not included within a military, Indian, or other reservation of the United States, and was valuable chiefly for timber, but unfit for cultivation. It was subject to entry under the Act of Congress aforesaid. That your petitioner published the required notice, made the required proof and paid for the said land $2.50 per acre, amounting in all to the sum of $400, besides the required fees, at the local land office aforesaid on July 13, 1903, and cash certificate No. 11309 was issued therefor the same day.

4. That the said proof and papers pertaining to your petitioner's said entry were forwarded by the said local land officers to the Commissioner of the General Land Office, and your petitioner was notified by the said Commissioner to show cause why his entry as to the said east half of the northwest quarter of said section six, should
3 not be cancelled, by office letter C of August 19, 1904, on the ground, as alleged by said Commissioner, that said eighty acres of land were unsurveyed. Your petitioner duly appealed from said decision of the Commissioner of the General Land Office, to the Secretary of the Interior, but said decision was affirmed by the Secretary of the Interior, on March 9, 1905. On April 11, 1906, your petitioner filed a motion for a review of said decision of the Secretary of the Interior, and the said motion for a review was denied by the Secretary of the Interior on July 11, 1906. On October 9, 1906, your petitioner filed a relinquishment of his right to the east half of the northwest quarter of said section six, in the local land office at Roseburg, Oregon, in compliance with the direction of the Secretary of the Interior, and without consideration, said relinquishment having been executed September 6, 1906, and on the same day, to wit, October 9, 1906, filed an application for the repayment of the purchase money paid by him for said parcel of land consisting of eighty acres, to wit, the east half of the northwest quarter of said section six. That on September 21, 1907 your petitioner withdrew said relinquishment and said application for repayment, no action, whatever, having been taken by the Secretary of the Interior or the

Commissioner of the General Land Office on said application to that time though in the due course of business said application would have been acted on long prior thereto. That the sum of $400 paid to the United States by your petitioner for the aforesaid one hundred and sixty acres of land embraced in his said entry is still retained
4 by the United States, and no portion there*for* has been returned, or offered to be returned, to your petitioner.

5. Your petitioner further represents that a patent conveying to him in fee simple the aforesid one hundred and sixty acres of land included in the said entry as made by your petitioner, consisting of the north half of the northeast quarter, and the east half of the northwest quarter, of said section six, was, on November 19, 1906, duly signed by the President of the United States, Theodore Roosevelt, by F. M. McKean, Secretary, and countersigned by C. H. Brush, Recorder of the General Land Office, and sealed with the seal of the General Land Office and duly recorded in Book 158 at page 171, of the land records of the General Land Office. Your petitioner further represents that said patent was in all respects executed, signed, countersigned, sealed and recorded, as required by the laws of the United States. That said patent so executed, recorded and issued as aforesaid, was afterwards and on December 13, 1906, transmitted by the Commissioner of the General Land Office to the local land officers at Roseburg, Oregon, with instructions to deliver the same to your petitioner, and the same was received by said local land officers. On December 28, 1906, the said local land officers returned said patent to the Commissioner of the General Land Office, without having delivered, or offered to deliver, the same to your petitioner, and without notifying him of the issue of said patent; and said patent is now in the Department of the Interior, and subject to the control of the respondent, the Secretary of the Interior. A copy of said patent is hereto annexed,
5 marked Exhibit "A" and made a part of this petition. The land embraced in said patent is of the value of $1500.

6. Your petitioner further represents that on April 5, 1907 and again on April 16, 1907, having at said earlier date first become aware that the aforesaid patent had been issued to him, but was being unlawfully withheld by the respondent, he made a demand on the respondent for the delivery to him of said patent or a certified copy thereof. The Receiver's duplicate final receipt which was issued to your petitioner when he paid the United States for said land had, previously to said demands, been filed by your petitioner in the Department of the Interior. On August 27, 1907, the Commissioner of the General Land Office refused to deliver the said patent or a certified copy thereof to your petitioner, and directed that, should his said decision become final, the said patent and the record thereof be cancelled and a new patent for but one-half of the land entered by your petitioner, to wit, the said north half of the northeast quarter of said section six, be issued and delivered to him. On September 21, 1907, your petitioner protested against said decision and appealed therefrom to the respondent, the Secretary of the Interior. On October 19, 1907, the respondent affirmed the said decision of

the Commissioner of the General Land Office, and refused to deliver said patent or a certified copy thereof to your petitioner, and directed the cancellation of said patent and its record. On *November 15th, 1907*, your petitioner filed with the respondent, as Secretary of the Interior, a motion for a review of his said decision,
6 which said motion was denied by the respondent on *December 7th, 1907*. Your petitioner was, however, allowed by the respondent thirty days in which to relinquish to the United States, the said north half of the northeast quarter of said section six, and upon his failure to do so the respondent directed the cancellation of said patent and its record. On *November 29th, 1907*, your petitioner notified the respondent of his refusal to relinquish his title to said tract of land.

7. Your petitioner further represents that in making his entry as aforesaid he practiced no fraud on the respondent, or any of his subordinates, or on any person whatever, but that the tract books at the said local land office at Roseburg, Oregon, showed the land entered by him as aforesaid to be surveyed and open to entry, and the said entry as made was allowed by said local land officers; that said land had been surveyed at the time of your petitioner's said entry was made as hereinafter set out: and that the official plat of survey of said section six, was by letter "E" of December 5, 1906, of the Commissioner of the General Land Office, transmitted to said local land office and ordered filed therein. That if your petitioner's said patent be cancelled the said land embraced in his said entry will become a part of the public lands of the United States and be open to entry by any qualified person. That no rights or claims of any other person whatever have attached to said land or any part thereof in any way.

8. Your petitioner further represents that the acts of the respondent, the Secretary of the Interior in withholding his said
7 patent and in directing the cancellation of the same and the record thereof, are arbitrary and without authority of law. That said patent having been executed, signed, countersigned, sealed and recorded as required by the laws of the United States, not only conveyed title in fee simple to the entire one hundred and sixty acres of land mentioned therein, to your petitioner, but by reason thereof it also terminated the jurisdiction of the respondent and of any Executive department of the Government over said land, and that the respondent has no power under the law to cancel said patent, or to issue a new patent for said land or any part thereof, and that the only lawful mode of avoiding said patent, if the facts were such as to require it, which is denied, is by judicial proceedings to set it aside or to correct or reform it.

Wherefore, as the respondent, James Rusolph Garfield, the Secretary of the Interior, has refused and still refuses to deliver or to cause to be delivered, said patent to your petitioner, he is deprived of the means of showing that title to said land has, by the laws of the United States become vested in him, and he is injured thereby, and as the law provides no other adequate remedy in the premises whereby the petitioner can secure said patent, to which

he is entitled and whereof he is deprived as aforesaid, your petitioner prays:

1. That a writ of mandamus may be issued and directed to the respondent, James Rudolph Garfield, Secretary of the Interior, commanding him to deliver, or cause to be delivered, to your petitioner, said patent for the one hundred and sixty acres of land aforesaid.

8 2. For such other and further relief as the nature of your petitioner's case may require and to the court may seem meet and proper.

BENJAMIN H. CARTFORD.

WATSON E. COLEMAN,
WM. L. FORD,
Petitioner's Attorneys.

DISTRICT OF COLUMBIA, *ss:*

I, Watson E. Coleman, being first duly sworn, make oath that I am the attorney for Benjamin H. Cartford, the above named petitioner, and that I am authorized by him to institute these proceedings; that the said Benjamin H. Cartford is a resident of Codington County, State of South Dakota, and is now absent from the District of Columbia; that the facts and things stated in said petition are true.

WATSON E. COLEMAN.

Subscribed and sworn to before me this 10th day of December, A. D. 1907.

[SEAL.] L. P. SQUIER,
Notary Public, D. C.

9 EXHIBIT "A." 171.

The United States of America to all to whom these presents shall come, Greeting:

Certificate No. 11309.

Whereas Benjamin H. Cartford of Codington County, South Dakota, has deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Roseburg, Oregon whereby it appears that full payment has been made by the said Benjamin H. Cartford according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the Public Lands," and the acts *of* supplemental thereto, for the North half of the North East quarter and the East half of the North West quarter of Section six in Twonship twenty-five south of Range six West of Willamette Meridian in Oregon containing one hundred and sixty acres according to the Official Plat of the Survey of the said Lands, returned to the General Land Office by the Surveyor General, which said Tract has been purchased by the said Benjamin H. Cartford.

Now know ye, That the United States of America, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Benjamin H. Cartford and to his heirs, the said Tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Benjamin H. Cartford and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the nineteenth day of November, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty first.

[L. S.]

By the President.

T. ROOSEVELT,
By F. M. McKEAN, *Secretary.*
C. H. BRUSH,
Recorder of the General Land Office.

6—494.

Rule to Show Cause.

Filed December 10, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 50028.

THE UNITED STATES OF AMERICA on the Relation of BENJAMIN H. CARTFORD, Petitioner,

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

On consideration of the petition filed herein on the 10th day of December, 1907, by the United States of America, on the relation of Benjamin H. Cartford, it is by the court this 10th day of December, 1907, ordered that the said James Rudolph Garfield, Secretary of the Interior, be and he is hereby commanded and ordered to show cause on or before the 3d day of January 1908, why a writ of mandamus

should not issue out of this court commanding him to deliver or cause to be delivered the patent heretofore issued for the land claimed by the petitioner, Benjamin H. Cartford, as prayed in the petition filed in this cause.

JOB BARNARD, *Justice.*

Marshal's Return.

Served copy of the within order on James R. Garfield, Secretary of the Interior, personally Dec. 10, 1907.

AULICK PALMER, *Marshal.*
S.

12 *Amendment to Petition for Mandamus.*

Filed December 23, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 50028.

THE UNITED STATES OF AMERICA on the Relation of BENJAMIN H. CARTFORD, Petitioner,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

To the Supreme Court of the District of Columbia:

Your petitioner, Benjamin H. Cartford, with leave of court, hereby amends the petition for mandamus filed herein on December 10, 1907, by adding to paragraph 7, at the end thereof, the following: That the Secretary of the Interior, in his aforesaid decision of July 11, 1906, denying your petitioner's Motion for a Review, held that inasmuch as your petitioner's good faith appeared he would be allowed to relinquish his entry as to the part thereof held intact, the north half of the northeast quarter of said section six, and make another entry for one hundred and sixty acres of land under the aforesaid Act of June 3, 1878.

BENJAMIN H. CARTFORD.

WATSON E. COLEMAN,
WM. L. FORD,
Petitioner's Attorneys.

13 DISTRICT OF COLUMBIA, *ss:*

I, Watson E. Coleman, being first duly sworn, make oath that I am the attorney for Benjamin H. Cartford, the above named petitioner, and that I am authorized by him to institute these proceedings; that the said Benjamin H. Cartford is a resident of Codington County, State of South Dakota, and is now absent from the District

of Columbia; that the facts and things stated in the foregoing amendment to the petition heretofore filed herein, are true.

WATSON E. COLEMAN.

Subscribed and sworn to before me this 23d day of December, A. D. 1907.

[SEAL.]

L. P. SQUIER,
Notary Public, D. C.

Answer.

Filed January 3, 1908.

In the Supreme Court of the District of Columbia.

No. 50028. At Law.

THE UNITED STATES *ex Rel.* BENJAMIN H. CARTFORD
v.
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

Now comes the defendant, James Rudolph Garfield, Secretary of the Interior, and for answer to the rule to show cause why a
14 writ of mandamus should not issue upon the petition of the United States on the relation of Benjamin H. Cartford, saith:—

I.

Defendant admits that on February 3, 1903, petitioner filed in the local land office at Roseburg, Oregon, a sworn declaratory statement of his intention to purchase certain lands under the provisions of the act of Congress of June 3, 1878 (20 Statutes at Large, 89), described as the north half of the northeast quarter (N. ½ N. E. ¼) and east half of the northwest quarter (E. ½ N. W. ¼) of Section six (6), in township twenty-five (25) South of range six (6) west, within the jurisdiction of said land office. Defendant admits that the land applied for was not included in any military, Indian or other reservation of the United States, and that the application of petitioner shows that he was qualified to enter lands under said act and that the lands applied for are chiefly valuable for timber, but he denies that all of said lands were surveyed public lands of the United States subject to entry under the provisions of said act. On the contrary, he avers that the tract described as the east half of the northwest quarter (E. ½ N. W. ¼) of said section six (6) was unsurveyed land and was not subject to entry under the authority of the act of June 3, 1878, which provides for the sale of surveyed public lands of the United States only.

II.

Defendant admits that petitioner published notice and made the usual proofs in the manner required, and that upon payment of the

purchase money and the usual fees, the Register and Re-
15 ceiver at said land office issued a cash certificate in due from,
but he denies that said Register and Receiver were authorized to allow entry of the land described as the east half of the northwest quarter (E. ½ N. W. ¼) of said section and to issue a cash certificate therefor. He avers that the act of the local officers was without authority in the allowance of said entry and the issuance of said certificate and that their allowance of every entry is subject to the approval of the Commissioner of the General Land Office, under the supervision and control of the Secretary of the Interior.

III.

Defendant admits that the Register and Receiver of said land office submitted said entry and their action thereon for the supervision and consideration of the Commissioner of the General Land Office, as in law they were bound to do, and that the Commissioner upon the examination of the record decided that the entry was illegal as to the land described as the east half of the northwest quarter (E. ½ N. W. ¼), for the reason that it was unsurveyed land, and petitioner was required to show cause why his entry as to said tract should not be canceled. Defendant admits that petitioner filed an appeal to the Secretary of the Interior who, by decision of March 9, 1905, affirmed the decision of the Commissioner and on July 11, 1906, denied a motion for review of said decision, but directed that petitioner be notified that he would be allowed to relinquish his entry as to that part of the entry remaining intact, and to make another
entry for one hundred and sixty acres, and if he failed to
16 avail himself of said privilege that the entry as to the north
half of the northeast quarter (N. ½ N. E. ¼) of said section six (6) shall remain intact and patent shall be issued therefor. Copies of said decision of July 11, 1906, are filed herewith as Exhibit "A," and made a part of this answer.

IV.

Defendant admits that on October 9, 1906, petitioner filed in the local land office a paper purporting to relinquish to the Government his right to the east half of the northwest quarter (E. ½ N. W. ¼) of said section six (6), and at the same time filed an application for the return of the purchase money paid upon said land, but he denies that the filing of said relinquishment was in compliance with the directions of the Secretary of the Interior. Defendant admits that petitioner subsequently withdrew said relinquishment and application for repayment, but he denies that the withdrawal of said relinquishment and application in any wise affected the right of petitioner as to said land for the reason that his entry as to said land had been canceled long prior to the filing of said relinquishment, and petitioner at the time of filing said relinquishment had no right or interest in the land that he could relinquish. Defendant denies that repayment of the purchase money has ever been refused, or that the Land Department has neglected to act upon such application.

V.

Defendant avers that the action of the Commissioner of the General Land Office and of the Secretary of the Interior in canceling said entry as to the tract that was found to be unsurveyed, was a proper exercise of the power conferred upon them to see that the public lands are disposed of only in the manner provided by law. That upon the cancellation of the entry as to said lands, and the refusal or failure of the petitioner to relinquish that portion of the entry remaining intact and to be restored to his right to enter the full quantity of one hundred and sixty acres, his entry remained intact as to the north half of the northeast quarter (N. ½ N. E. ¼) for which he was entitled to a patent, and his right to make any other or further entry under said act was exhausted.

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VI.

Defendant admits that a patent purporting to convey to petitioner the land described as the north half of the northeast quarter (N. ½ N. E. ¼) and the east half of the northwest quarter (E. ½ N. W. ¼) of said section six (6) was written, signed, countersigned and recorded, but was not delivered. He denies that there was any authority for the issuance of any such patent which was written and signed inadvertently, or that the records of the land office show that petitioner was entitled to a patent for such land. On the contrary he avers that the records of the land office, including the final certificate known as the patent certificate, upon authority of which petitioner can alone claim a right to a patent for any of the public lands of the United States, show upon their face that petitioner is not entitled to a patent for such land and that he is entitled to a patent for the north half of the northeast quarter of said section six (6), which the land department has directed shall be issued.

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VII.

Defendant admits that petitioner made a demand of the Commissioner of the General Land Office for delivery of the patent that petitioner claims is unlawfully withheld from him, or for a certified copy thereof, which was refused because there was no authority for the issuance of said patent. Defendant admits that petitioner appealed to the Secretary of the Interior who, on October 19, 1907, rendered a decision affirming the action of the Commissioner and directing that the patent applied for be canceled and that a patent issue in conformity with the entry for the land to which petitioner is entitled, as shown by the final certificate. That a motion for review of said decision was denied December 7, 1907. Copies of said decisions of October 19, 1907, and of December 7, 1907, are annexed hereto as Exhibits "B" and "C", and made a part of this answer.

VIII.

Defendant denies that the withholding of said patent is arbitrary and without authority of law. On the contrary, he avers that the determination by officials of the Land Department that a part of the

land embraced in petitioner's application and entry was unsurveyed, and the cancellation of said entry as to that tract, are matters resting within the exclusive jurisdiction of the Land Department as a special tribunal to which is confided the power and authority to determine whether the land is being disposed of
19 according to law, and such decision is not subject to control by mandamus. That the final certificate, which is in conformity with the record of petitioner's entry, is the highest evidence of his right to a patent. That said certificate (a copy of which is annexed hereto as Exhibit "D") shows upon its face the record of cancellation of the entry as to the east half of the northwest quarter (E. ½ N. W. ¼), and the certificate as amended afforded the only right for the issuance of a patent. That the withholding of a patent issued in contravention of the record and patent certificate, and the issuance of a patent in conformity with the record is not only within authority conferred by law upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior, but is a duty imposed upon defendant and said officers of the Land Department.

Wherefore, the defendant, having answered fully, prays judgment that the aforesaid rule may be discharged and said petition be dismissed, at the cost of the relator.

JAMES RUDOLPH GARFIELD,
Secretary of the Interior.
GEORGE W. WOODRUFF,
Assistant Attorney General, Department of the Interior, Attorney for Defendant.
E. F. BEST,
Assistant Attorney, Interior Department, Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

James Rudolph Garfield, being first duly sworn, upon oath
20 deposes and says, that he is the Secretary of the Interior, and the defendant in the above entitled cause; that he has read the foregoing answer and knows the contents thereof; and that the matters and things therein stated are true as he verily believes.

JAMES RUDOLPH GARFIELD.

Subscribed and sworn to before me this 23rd day of December, A. D. 1907.

[SEAL.] EDWD. B. FOX,
Notary Public, District of Columbia.

DEPARTMENT OF THE INTERIOR, J. W. P.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 16, 1907.

I hereby certify that the annexed copies are true and literal exemplifications of the originals on file in the General Land Office.

In testimony whereof I have hereunto subscribed my name, and

caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

[SEAL.] R. A. BALLINGER,
Commissioner of the General Land Office.

21 EXHIBIT A.

A. W. P.
33-257. DEPARTMENT OF THE INTERIOR, A. W. P.
F. L. C. WASHINGTON, *July* 11, 1906. S. V. P.

In re BENJAMIN H. CARTFORD.

The Commissioner of the General Land Office.

SIR: A motion has been filed on behalf of Benjamin H. Cartford for review of departmental decision of March 9, 1905, (not reported), in the above-entitled case, wherein was affirmed that of your office, dated December 8, 1904, holding for cancellation, for the reason that the same was unsurveyed, that part of his timber land entry No. 11309, described as the E. ½ of the N. W. ¼ of Sec. 6, T. 25 S., R. 6 W., Roseburg, Oregon, land district.

In your said decision it was stated that the above entry was for a part of the same unsurveyed tract partially embraced in timber and stone entry No. 11310, made by C. C. Wiley, canceled by your office decision of October 18, 1904, to which attention was directed. It appears from an examination of said latter decision that, upon receipt of an earlier decision directing them to call upon Wiley
22 to show cause why his said entry should not be canceled for such illegality, the local officers, by letter of August 25, 1904, stated that the records of their office showed the tract in question to be fully surveyed, all the interior lines having been run, and, in response to a later request from your office, a tracing of that part of such plat was transmitted. Referring to the same you stated that:

Upon examination of the tracing I find it to be that of a *donation* plat approved October 30, 1860, by the then surveyor-general, and it is clear that you were in error to allow any entry upon this tract. The lines drawn through sections 6 and 7 are not on the plat on file here of which yours is a triplicate. These sections are marked "unsurveyed" on the 1860 plat. Lines drawn across the section do not constitute a survey of the section in any event, unless there are lottings or areas on the plat and these lines were erroneously and unlawfully inserted without authority by some one. Furthermore you doubtless had before you three other plats, the one approved in 1853 showing section 6 to be *un*surveyed, and two later plats, one approved June 21, 1878, and one a supplemental plat approved April 1, 1884, both showing the W. ½ of section 6 as *un*surveyed. This office is at a loss to understand why you allowed an entry to be made according to a donation plat 44 years old upon the supposition that, because two vertical lines were found drawn through the section, it might be construed as surveyed, and why you ignored the showing made by the subsequent plats on file clearly indicating the land to be *un*surveyed.

The substance of the specifications of error alleged as grounds for review is that in concurring in the finding of your office that the tract in question was unsurveyed, the Department erred in not suspending the entry, with direction that order be issued for the survey of said west half of section 6; in not holding the entry intact, directing that such survey be made, as said entry was in all other respects proper and in accordance with the departmental rules and regulations; and because any mistake or oversight in allowing the
23 same was in nowise due to any fault, neglect, or inadvertence of the entryman. In the brief subsequently filed in support of the motion for review, the above contention is further supplemented by the statement that as a matter of fact the section and township lines forming the boundaries of said section 6 have now been surveyed, but that no plat constructed in accordance with the same has yet been filed in the local office; that such a supplemental plat has been prepared, but is being withheld until "all the fraudulent entries in said section 6 have been canceled;" that therefore the entry in question should be suspended until the filing of the plat, and thereafter the entryman be allowed to either amend his entry to conform to same, or make a new entry.

The act of June 3, 1878 (20 Stat., 89), under which this entry was made, provides only for the sale of the "surveyed" public lands of the United States within the States and Territories therein mentioned. Hence, when it was determined that said entry embraced in part an unsurveyed tract of public land, your office to that extent held the same for cancellation. This action being proper was accordingly affirmed by the departmental decision now sought to be reviewed, at which time, though carefully considered, it was not thought necessary to discuss the matter at length therein. Even where a survey of long standing is believed to be false or fraudulent, your office is warranted in withholding such a tract from entry, and if, upon examination, it is disclosed that the former survey was in fact fraudulent to such an extent as to require a resurvey,
23½ then the lands embraced in such tract or township could not be denominated surveyed lands within the meaning of the said act until such resurvey was completed, plat thereof filed at the local land office, and proper notice of this fact given. Emily A. Laird *et al.* (9 L. D., 12). The tract in question being unsurveyed, the local officers clearly erred in allowing entry therefor, and even though the entryman was not a party to this mistake or oversight, he can not be allowed any advantage by reason of the allowance of such illegal entry. This would, in effect, be the result if the entry were held intact until the plat of survey were properly filed, and accordingly the request for suspension thereof must be denied. When plat of survey of the tract in controversy has been filed at the local office, and due notice of this fact given, the land embraced therein will be subject to entry by the first legal applicant in point of time. No superior right of Cartford can be recognized for the E. ½ of the N. W. ¼ of said section 6, in the presence of a prior valid adverse application.

In accordance with the views herein expressed, no good or suffi-

cient reason is presented for disturbing the decision complained of, and none otherwise appearing said motion for review is hereby denied.

Inasmuch as the good faith of Cartford in making this timberland entry is in nowise questioned, however, it would seem that, in the event he should so desire, he might be permitted to relinquish his entry as to that part held intact, and thereafter make another such entry of one hundred and sixty acres of land of the character contemplated by the act of June 3, 1878, *supra*. You will ac-
24 cordingly direct the local officers to advise Cartford of this concession, allowing him a reasonable time, which your office may indicate, to avail himself thereof. Otherwise, in the absence of any valid objection, the original entry as to the N. ½ of the N. E. ¼ of said section 6 will stand intact and patent therefor be issued.

The papers are herewith returned.

Very respectfully, THOS. RYAN,
Acting Secretary.

25 EXHIBIT B.

H. S. B. E. F. B.
D-1405. DEPARTMENT OF THE INTERIOR, E. F. B.
G. W. W. WASHINGTON, *October* 19, 1907. S. V. P.

Ex Parte BENJAMIN H. CARTFORD.

Application for Patent.

The Commissioner of the General Land Office.

SIR: With your letter of October 14, 1907, you transmit the appeal of Benjamin H. Cartford from the decision of your office of August 27, 1907, refusing to deliver to him a patent that had inadvertently issued upon timber and stone entry made by said Cartford for the N. ½ N. E. ¼ of Sec. 6, T. 25 S., R. 6 W., Roseburg, Oregon.

This entry was made originally for the N. ½ N. E. ¼ and E. ½ N. W. ¼ of said section, but was held for cancellation as to the E. ½ N. W. ¼ of said section, and your decision was affirmed by the Department, July 11, 1906, which by a later decision allowed the entryman to relinquish as to the N. ½ N. E. ¼ and to make another entry for 160 acres or in case of failure to do so, that patent would issue for said tract. He was advised of his right and on Octo-
ber 9, 1906, he filed in the local office a relinquishment, not
26 of the N. ½ N. E. ¼, but of the E. ½ N. W. ¼, the tract that had already been canceled although the cancellation had not been noted on the tract book. At the same time he filed an application for the return of the purchase money of the tract relinquished.

On the same day the local officers forwarded the papers to your office and when they were received the cancellation of the entry as to the E. ½ N. W. ¼ was noted upon the records and upon the certificate by writing across the face of it in red ink: "Cancelled by relinq. as to E. ½ N. W. ¼ Oct. 9-1906."

Thereafter, November 19, 1906, a patent inadvertently issued upon said entry for the E. ½ N. W. ¼ which had been canceled, as well as for the N. ½ N. E. ¼. Your office refused to deliver the patent which had been recorded, for the reason that it was issued in contravention of the certificate of entry and record upon which it was predicated, basing your decision upon authority of the decision in the case of William H. McLarty (4 L. D., 498).

The issuance of said patent being without authority and absolutely void, it was properly withheld from delivery, and your office decision is therefore affirmed.

The entryman will be allowed thirty days from notice of this decision to elect whether he will relinquish the portion of his entry that remains intact, to-wit, the N. ½ N. E. ¼ of said section, and upon failure to do so the patent will be canceled, and patent will issue for said tract in conformity with the entry.

The papers are returned herewith.

Very respectfully,

JAMES RUDOLPH GARFIELD,
Secretary.

27

EXHIBIT C.

Copy.

L. L. B.
D-1405.

DEPARTMENT OF THE INTERIOR, E. F. B.
WASHINGTON, *Dec.* 7, 1907.

Ex Parte BENJAMIN H. CARTFORD.

Motion for Review.

The Commissioner of the General Land Office.

SIR: With your letter of November 22, 1907, you transmit a motion filed by Benjamin H. Cartford for review of the decision of the Department of October 19, 1907 (not reported), denying his application for delivery of a patent erroneously issued to said Cartford for the E. /2 of the N. W. /4 and the N. /2 of the N. E. /4 of section 6, T. 25 S., R. 6 W., Roseburg, Oregon.

The entry in this case was canceled as to the E. /2 of the N. W. /4, leaving the N. /2 of the N. E. /4 intact. The entryman allowed to relinquish the entry as to the N. /2 of the N. E. /4 and to make a new entry for 160 acres if he so elected. Otherwise it was directed that patent be issued for said N. /2 of the N. E. /4. The
28 entryman did not relinquish the N. /2 of the N. E. /4, but filed a relinquishment of the E. /2 of the N. W. /4, which had been canceled by decision of the Department of July 11, 1906, and he had thereafter no interest or right in said tract to relinquish. Although the record only authorized the issuance of a patent for the N. /2 of the N. E. /4, your office inadvertently issued a patent for said tract as well as for the E. /2 of the N. W. /4.

Your decision refusing to deliver the patent was affirmed and he

was allowed thirty days in which to elect whether he will relinquish the N. /2 of the N. E. /4 and upon failure to do so the patent will be canceled and the patent will issue for the said tract in conformity with the record.

Since the filing of the motion for review Cartford has filed with the record a notice that he declines to relinquish the entry as to the N. /2 of the N. E. /4 and as there is no merit in the grounds set forth in his motion for review, said motion is denied, and you will execute the instructions given in the decisions of the Department of October 19, 1907.

The papers are herewith returned.

Very respectfully,

(Signed) FRANK PIERCE,
Acting Secretary.

29

EXHIBIT D.

No. 11309.

LAND OFFICE AT ROSEBURG,
OREGON, *July* 13, 1903.

It is hereby certified that, in pursuance of law, Benjamin H. Cartford, residing at Watertown, in Codington County, State of S. D., on this day purchased of the Register of this Office the N. ½ N. E. ¼, E. ½ N. W. ¼, of Section No. 6 in Township No. 25 S. of Range No. 6 W. of the Will. Principal Meridian, Ore. containing 160 acres, at the rate of two dollar- and 50 cents per acre, amounting to Four Hundred Dollars and — cents, for which the said Benjamin H. Cartford has made payment in full as required by law.

Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Benjamin H. Cartford shall be entitled to receive a Patent for the lot above described.

J. T. BRIDGER, *Register.*

Patent to contain reservation according to proviso to the Act of Aug. 30, 1890.

[Stamped across the face in red ink:] Canceled or relinq. as to E². N. W. Oct. 9", 1906.

Endorsed.

Apr. 10, 1906 To R & R with copy of departmental decision of M'ch 9 1905. D. E. "C"

July 20, 1906, To R & R with copy of departmental decision denying motion; and with instructions D. E.

No. 11309

Cash Entry.

Land Office at

.....

30	July 25, 1906 To R & R with copy of Sec'y's decision D. E.	Sec. 6, Town. 25 S, Range 6 W 5–31–04 No action required by Div. P. Entry Intact Ref'd C
	Relinquished and canceled as to E ½ N W ¼ Oct. 9, 1906 163712/1906 07/64185	R-R- allowing cl'm't 30 days to show cause why entry should not be canceled as to E ½ N W ¼- Aug. 19/04 G. M. F.
		R-R- to carry out instructions of letter "C" of Aug. 19/04 G. M. F. 12/8/04
		R-R- promulgating decision Mar. 23/05- G. M. F.
		See reverse side for further notation
	Transmitted Patent Dec. 13, 1906 to Register & Receiver. M. K. G.	Approved Oct. 19, 1906, as to N ½ N E ¼
		By D. E. ex., Clerk.
		Division "C"
		Patented Nov. 19–1906
	M. L. 185457	Recorded Vol. 158, Page 171 12–50

31 *Demurrer to Answer.*

Filed January 3, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50028.

THE UNITED STATES OF AMERICA on the Relation of BENJAMIN H. CARTFORD, Petitioner,

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The Petitioner says that the answer of the respondent, James Rudolph Garfield, Secretary of the Interior, to the petition in the above entitled cause, is bad in substance.

WM. L. FORD,
WATSON E. COLEMAN,
Petitioner's Attorneys.

NOTE.—Among the points to be argued in support of the foregoing demurrer are:

First. That the respondent's said answer sets forth no good and sufficient reason in law why the patent in controversy should not be delivered to the relator, and why a writ of mandamus should not issue compelling the respondent to so deliver said patent.

Second. That said answer shows that the respondent acted un-

lawfully and arbitrarily in refusing to deliver said patent to the relator.

WM. L. FORD,
WATSON E. COLEMAN,
Petitioner's Attorneys.

32 *Opinion.*

Filed January 31, 1908.

In the Supreme Court of the District of Columbia.

No. 50028. At Law.

THE UNITED STATES *ex Rel.* BENJAMIN H. CARTFORD
v.
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

In this case a petition for a writ of mandamus is presented, wherein it is claimed the relator is entitled to the receipt of a patent for 160 acres of land, which it is averred has been signed, sealed, and recorded in the Land Office in the Department of the Interior, and by which it is claimed title has passed to the relator for the land described therein, namely, the east half of the northwest quarter, and the north half of the northeast quarter, of Section 6, Township 25, south of Range 6, west of Willamette meridian, in the state of Oregon.

The petitioner avers that the patent was duly executed, after the application had been made, and payment made, for entry of the land, under the act for the sale of timber lands, approved June 3, 1878 (20 Statutes-at-Large, 89); and that the patent, after being so executed and recorded, was sent to the local land office in Oregon for delivery to the relator; but before it was delivered, and without notifying the relator that it was there for delivery, it was re-
33 turned to the Land Office in Washington, and its delivery refused.

A copy of the patent is annexed to the petition, which shows that the same was signed by the President, by his secretary, on the 19th day of November, 1906, and countersigned by the Recorder of the General Land Office.

To this petition the Secretary of the Interior has filed an answer, in which he admits that the relator filed in the local land office the sworn declaratory statement of his intention to purchase the said land as claimed; and he admits that the land applied for was not included in any military, Indian, or other reservation of the United States; and that the application shows that the petitioner was qualified to enter lands under the said act; and that said lands are chiefly valuable for timber; but he denies that all of said lands were surveyed public lands of the United States, subject to entry under the provisions of said act; and he avers that the tract described as the east half of the northwest quarter of said Section 6 was unsurveyed land,

and was not subject to entry under the authority of the said act of June 3, 1878, which provides only for the sale of surveyed public lands of the United States.

He admits that the petitioner published notice, and made the usual proofs in the manner required, and that upon payment of the purchase money and the usual fees, the Register and Receiver of the local land office issued a cash certificate in due form; but he denies that the Register and Receiver were authorized to allow entry of the land described as the east half of the northwest quarter of said section, and to issue a cash certificate therefor.

34 He admits that the Register and Receiver of the local land office submitted said entry, and their action thereon, to the Commissioner of the General Land Office, as required to do by law, and that the Commissioner, upon an examination of the record, decided that the entry was illegal as to the east half of the northwest quarter, for the reason that it was unsurveyed land, and that the petitioner was required to show cause why his entry as to said tract should not be canceled.

A copy of the decision of the Secretary, of July 11th, 1906, affirming his previous ruling of March 9th, 1905, and holding that only the north half of the northeast quarter of said Section 6 was subject to entry, and that a patent should issue therefor, is annexed to the answer, and marked Exhibit A.

The defendant admits that a patent, purporting to convey to the petitioner the lands described, was signed, countersigned, and recorded, but was not delivered; and he denies that there was any authority for the issuance of any such patent, which was written and signed inadvertently.

He avers that the records of the Land Office, including the final certificate known as the patent certificate, upon authority of which alone the petitioner can claim a right to a patent for any of the public lands, show upon their face, that the petitioner is not entitled to a patent for such land, but that he is only entitled to a patent for the north half of the northeast quarter of said section, which patent the Land Office has directed shall be issued.

To this answer of the respondent, the relator filed a de-
35 murrer. The points of law mentioned in the note appended to the demurrer, are two; first, that the answer sets forth no good and sufficient reason in law why the patent in controversy should not be delivered to the relator; and, second, that the respondent acted unlawfully and arbitrarily in refusing to deliver the patent.

The counsel for both parties have argued the case very ably and thoroughly, and submitted briefs which the court has carefully examined.

The whole controversy is based on the claim made by the officers of the land department that the east half of the northwest quarter of section 6 was not subject to entry and patent, because the whole section had not been surveyed. There does not appear to be any other claimant for the land, and no disqualification of the claimant for the land under the said timber culture act, and no question as to the character of this land as to its being subject to entry under

that act, other than that the section had not been completely surveyed.

The act says:

"That surveyed public lands of the United States within the states of California, Oregon, Nevada, etc., valuable chiefly for timber, but unfit for cultivation, etc., may be sold to citizens of the United States, etc., in quantities not exceeding 160 acres to any one person, etc., at the minimum price of $2.50 per acre."

The petition in this case avers that this section of land was surveyed. The answer avers that the tract described as the east
36 half of the northwest quarter was unsurveyed. Just what lines were run does not appear, but in argument it was claimed that the only line not run was the west line of the section. If such is correct, a portion of the lines for this eighty acres in dispute were actually surveyed.

What substantial objection can the Government have to delivering the patent for such reason? If the patent conveys no title as against the Government, to the eighty acres unsurveyed, the Government could still treat the eighty acres as belonging to the public lands, and allow the same to be sold to some one else; but if the title has passed, notwithstanding the survey was incomplete, then the refusal to deliver the patent would leave the relator without any means of establishing his title in the state of Oregon.

Since the Supreme Court of the United States delivered its opinion in the case of the United States *v.* Schurz, 102 U. S., 378, there is no question but what the title passes from the United States to the patentee of public lands when the entry is made, the patent issued by the proper officers, and recorded in the records kept for that purpose in the Land Office.

Before that case was decided, there seems to have been some doubt as to the title passing until the patent was actually delivered to the patentee.

The argument on behalf of the respondent is that the patent in this case is void, because of the error in allowing eighty acres of the land to be bought and paid for in advance of a survey; and
37 that being void as to part, it is void in toto, and is therefore a nullity; and that the same conveys no title whatever.

Since the case of Wm. H. McLarty, decided by Secretary Lamar, April 28, 1886, (Decisions of the Department of the Interior Relating to Public Lands, Vol. 4, page 498,) the Land Department, it is claimed, has held that a patent issued in contravention of the record in the office, is without authority and void, and will not be delivered by the Department, notwithstanding it was signed, sealed, and recorded.

I am unable to reconcile this ruling with the principles announced in the case of the United States *v.* Schurz; and I can not distinguish the case at bar from that case, in respect to the question of the patent being void. Both patents were inadvertently issued. In the Schurz case it was claimed the patent was inadvertently issued and recorded, because the land in question had been designated as a town site, and a controversy was then going on in the Land Office in re-

gard to the same, which was not brought to the attention of the patent clerk.

In this case there was a decision of the Land Department that eighty acres of the land patented was not subject to patent, because it had not been surveyed; but there was either error of fact as to the survey, or through inadvertence this decision of the Land Office was not brought to the attention of the patent clerk; and the patent was regularly issued, so far as it appears upon its face, in accordance with the entry and payment that had been made; and if the court was correct in the Schurz case, in holding that the title passed the
38 moment the patent had been executed and recorded, then it seems to me there was nothing left in the hands of the Land Office, or the Secretary of the Interior, in the nature of power, that would authorize them to recall the patent, or to expunge it from the record; and that the original patent itself, or a certified copy, became the property of the patentee, whether it conveyed all the title he had supposed, and for which he had paid, or not; and that being so, there was nothing for the Department to do but to allow the patentee to have his patent; and if the Government still claimed that the eighty acres were unlawfully patented, and were still the property of the United States notwithstanding the patent, the courts of the United States were open for the purpose of canceling so much of the patent as conveyed no title, if such patent should be a hindrance to the Government in selling to some one else the said eighty acres.

It seems to me that the difficulty lies in the Department holding that the patent was void because of the land having been unsurveyed. It may be voidable, but I do not think it is void. The purpose of the survey, it seems to me, is to make the descriptions certain and correct; and if all the lines were run for this section, except the west line, it seems to me there was no difficulty about the land being identified.

In fact it is claimed in argument that after the entry was made, the survey was completed and duly marked on the plats; but whether that was so or not, the partial survey that had been made and entered on the plat books, would enable any surveyor to locate the
39 east half of the northwest quarter of this section with absolute certainty.

So that the whole objection to delivering the patent appears to be the technical one that the Government had not taken all the precedent steps usually required and necessary to allow the land to be purchased by the patentee, before the purchase was made.

If the title has passed, notwithstanding the want of completing the survey, and the patentee is satisfied therewith, and can maintain his title to the ground, why should the Government refuse to deliver the patent, and to consider the purchase completed?

The only reason that I can conceive is that the Department, having inadvertently issued the patent, wishes to correct its own irregularity, out of abundant caution, and that no substantial reason could be urged for withholding the patent on any other ground.

The Supreme Court of the United States held in the case of Bicknell *v.* Comstock, 113 U. S., 149, that the action of the Secretary in

tearing off the seals and erasing the president's name from a patent, and mutilating the record thereof in the General Land Office, without the consent and against the protest of the grantee, was nugatory; and that the title was still left in the grantee in as full force as if no such attempt to destroy or nullify it had been made.

The court was following the decision in the Schurz case, and that was a patent which had been issued by mistake, and which the Department insisted upon recalling from the local land office,
40 and canceling.

In the case *In Re.* Emblen, 161 U. S., 52, the court holds that the patent conveys the legal title to the patentee and can not be revoked or set aside except upon judicial proceeding instituted in behalf of the United States.

In Germania Iron Co. *v.* U. S., 165 U. S., 379, it is held that the issue of a patent is in effect the final determination of that Department in favor of the patentee, etc.

Counsel for the respondent in his argument alluded to the patent as an administrative act purely, likening it to an execution issued on a judgment which must have a proper record to support it, otherwise it would be void.

It is to my mind, however, more like the final judgment in a case, after proper pleading and hearing, where all questions of conflict of evidence are settled by a decision of the court; and when the judgment is pronounced, so long as it remains unrevoked, it becomes a verity, unless for some reason the court had no jurisdiction, and in that event the judgment can always be attacked collaterally; but for irregularities only, or any reason short of a jurisdictional one, the judgment is conclusive and binding upon the parties to the controversy, until it is set aside by some direct proceeding in the cause.

Here the relator made his entry, paid for the land, and awaited his patent.

In considering the case after the entry was made, a question arose in the Land Office as to the patentability of half of the land which the relator had purchased, and that question was determined
41 in the Land Office adversely to the relator; and an appeal was taken, and the ruling sustained, and an application for a rehearing was made; and while the record was in that condition, and probably by reason of the fact that the Land Office has separate divisions and clerks who transact different parts of the business pertaining to the sale of lands, the clerk having the preparation of the patents, inadvertently prepared, and had executed, the final act which divests the title from the United States, and vests it in the patentee, and thereby left the question of patentability still pending in the Land Department, or with an adverse ruling then made. The execution and recording of the patent vested in the relator all the title which the Government could thereby convey, and he is entitled to the evidence of his purchase, so that he may establish that title of record in the state of Oregon.

The result of my consideration is that this case can not be dis-

tinguished in principle from the Schurz case, and that the demurrer to the respondent's answer must therefore be sustained.

JOB BARNARD, *Justice.*

Order Sustaining Demurrer, &c.

Filed February 3, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50028.

THE UNITED STATES OF AMERICA *ex Rel.* BENJAMIN H. CARTFORD, Petitioner,

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Come now here as well the Relator, as the Respondent, by
42 their respective Attorneys; whereupon and upon consideration of the Relator's demurrer to the answer of the Respondent filed herein, it is ordered that said demurrer be and hereby is sustained; and the Respondent by his Attorneys, George W. Woodruff and E. F. Best, says he will stand upon his answer as heretofore filed.

Thereupon, the Court being fully advised, it is considered, ordered and adjudged that the Respondent, James Rudolph Garfield, Secretary of the Interior, be, and he is hereby, commanded within twenty days after this date to deliver or cause to be delivered to the Relator, Benjamin H. Cartford, the patent executed by the President of the United States, by his Secretary, F. M. McKean, on the nineteenth day of November, in the year of our Lord one thousand nine hundred and six, conveying to the Relator title in fee simple in and to the north half of the north east quarter and the east half of the north west quarter of section six in township twenty-five south or range six west of Willamette meridian, in the State of Oregon.

The Respondent thereupon in open Court by counsel excepted to the judgment so rendered and prayed an appeal from the judgment of this Court to the Court of Appeals of the District of Columbia, and pending such an appeal, the judgment is stayed and no writ shall run out thereon against the Respondent.

JOB BARNARD, *Justice.*

43 *Directions to Clerk for Preparation of Transcript of Record.*

Filed February 13, 1908.

In the Supreme Court of the District of Columbia, the 11th Day of February, 1908.

At Law. No. 50028.

UNITED STATES *ex Rel.* BENJ. CARTFORD
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

The Clerk of said Court will please make transcript of the record in said case of the following:

Petition for Mandamus—Amendment to petition—Answer of Respondent—Opinion of Court—Judgment—Rule to show cause—Demurrer to answer.

E. F. BEST,
Attorney for Respondent.

44 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 43, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50028 At Law, wherein The United States of America, on the relation of Benjamin H. Cartford is Petitioner, and James Rudolph Garfield, Secretary of the Interior, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 27th day of February, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1871. James Rudolph Garfield, Secretary of the Interior, appellant, *vs.* The United States of America on the relation of Benjamin H. Cartford. Court of Appeals, District of Columbia. Filed Feb. 28, 1908. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia.

APRIL TERM, 1908.

No. 1871.

No. 10 SPECIAL CALENDAR.

James Rudolph Garfield, Secretary of the Interior, *Appellant,*

v.

The United States, *ex rel* Benjamin H. Cartford, *Appellee.*

BRIEF OF APPELLANT.

In the Court of Appeals of the District of Columbia.

APRIL TERM, 1908.

JAMES RUDOLPH GARFIELD, Secretary of the Interior,
Appellant,
v.
THE UNITED STATES, ex rel BENJAMIN H. CARTFORD,
Appellee.

No. 1891.
No. 10 Special Calendar.

BRIEF OF APPELLANT.

This appeal is from a decision by the court below upon a petition for mandamus commanding appellant, as Secretary of the Interior, to deliver to appellee a patent for one hundred and sixty acres of land.

Under the act of June 3, 1878 (20 Stat., 89), authorizing the sale of *surveyed* public lands of the United States, Cartford applied to enter and purchase lands described as the N. ½ NE. ¼ and E. ½ NW. ¼ sec. 6, T. 25 S., R. 6 W., in the State of Oregon. The register and receiver at the local office allowed the application and final certificate was issued by them, but upon examination of the entry by the Commissioner of the General Land Office, whose approval is necessary to the allowance of every entry, it was found that the tract described as the E. ½ NW. ¼ was unsurveyed, and not subject to purchase and entry under said act. The Commissioner therefore disallowed and canceled Cartford's entry as to said tract, and approved it for patent as to the remaining tract.

The judgment of the land department awarding to Cartford the right to a patent for the N. ½ NE. ¼ of said section 6, and denying his right to a patent for the land described as the E. ½ NW. ¼, became final by decision of the Secretary of the Interior on Cartford's appeal. That constituted the authority, and the only authority, for the issuance of a patent to Cartford for any lands.

In the performance of the ministerial act to carry such judgment into effect, the clerk who drafted the patent committed a clerical error and caused it to be written for 160 acres instead of for the 80 acres awarded to Cartford, and such patent was signed, sealed, countersigned, and recorded, and was transmitted to the local officers for delivery. Upon discovery of the error, before delivery to Cartford, it was returned to the Commissioner and was canceled by direction of the Secretary of the Interior.

Cartford demanded the delivery of the patent, which was refused, and he was notified that a patent would be issued for the 80 acres embraced in the N. ½ NE. ¼ of said section, in conformity with the decision of the Department approving his entry as to said tract.

Thereupon he sought to compel the delivery of the patent for 160 acres by mandamus.

The court erred:

First. In assuming jurisdiction to try and determine upon this proceeding the correctness of the decision of the land department as to whether the lands were or were not surveyed public lands of the United States and in holding, in effect, that the 80 acres in dispute were actually surveyed lands. (See record, pp. 21 and 22.)

Second. In not holding that the patent in question is void, having been issued without authority of law and in contravention of the decision of the Department awarding the right to a patent.

Third. In holding, in effect, that a patent for public lands may issue under the provisions of the act of June 3, 1878, without an entry upon which to predicate the right to such patent.

With reference to the first ground of error it is sufficient to say that "no portion of the public domain, unless it be in special cases not affecting the general rule, is open to sale until it has been surveyed and an approved plat of the township embracing the land has been returned to the local land office." (Buxton *v.* Traver, 130 U. S., 235.) Furthermore the act of June 3, 1878, expressly limits the right of purchase to *surveyed* public lands.

Whether the legal subdivision described in Cartford's entry as the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ was surveyed land subject to entry was a question that rested solely within the jurisdiction of the officers of the land department to determine. (Cragin *v.* Powell, 128 U. S., 691.) Their decision and judgment upon matters which the law imposes upon them the duty to decide for themselves, will not be controlled by mandamus. (Riverside Oil Co. *v.* Hitchcock, 190 U. S., 316, 325.) The power of supervision by the Commissioner of the General Land Office over the acts of the register and receiver rests under the general power and authority vested in the Commissioner by the organic act to perform, under the supervision of the Secretary of the Interior, all duties pertaining to the survey and disposal of the public lands. (Knight *v.* Land Association, 143 U. S., 191; Hendricks *v.* Castro, 23 How., 438; Roche *v.* Hitchcock, 28 Court of Appeals, 338.) It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary. (Bishop of Nesqually *v.* Gibbons, 158 U. S., 155, 167.)

As to the second and third grounds of error, the Secretary of the Interior was justified in refusing to deliver this patent for the reason that there was not only no authority for

its issuance, but it was issued in direct violation of the decision of the land department awarding the right to a patent upon Cartford's entry. Cartford's right to a patent for public lands rested upon that decision and that alone, and the patent must conform to it. "*The patent is but the evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority.*" (U. S. *v.* Stone, 2 Wall, 525, 535.) As expressed in Stoddard *v.* Chambers (2 How., 284, 318), "*The issuing of a patent is a ministerial act which must be performed according to law.*"

A patent for land reserved from sale is as effective a conveyance of title as a patent for lands that from any other cause are not subject to disposal; for instance, where there was no entry of the land to authorize the issuance of a patent, and there is no room for presumption that the necessary acts had previously been performed to justify its issuance.

Not being a matter of judgment but a ministerial act predicated upon a judicial determination by the officers of the land department awarding a right to a patent, it must conform to that judgment, as it depends for its validity upon some authority of law. Otherwise, it is a nullity, having no more efficacy than any other ministerial act that fails to conform to the judgment or authority under which it is issued.

In this case the patent certificate, as well as the decision of the land department, upon which it was issued, only authorized the issuance of a patent for the 80 acres surveyed as the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ of the section. The issuance of a patent for any other land was without warrant or authority, and was therefore void.

Nullities have no efficacy or binding force whatever and confer no right upon anyone. In the application of this principle to the question at issue, the courts have uniformly

held that where a patent has issued for a tract of public land without authority of law, it is *absolutely void* and may be impeached collaterally in any proceeding in a court of law. Polk's Lessees *v.* Wendall (9 Cranch., 87); ib. (Wheat., 293); Patterson *v.* Winn (11 Wheat., 380); Stoddard *v.* Chambers (2 How., 284); Easton *v.* Salisbury (21 How., 426); United States *v.* Stone (2 Wall., 525); Morton *v.* Nebraska (21 Wall., 660); Smelting Co. *v.* Kemp (104 U. S., 636); Burfenning *v.* Chicago &c. R. R. Co. (163 U. S., 321).

It is immaterial whether the want of authority is because the land had been reserved from disposal, as in the case of U. S. *v.* Stone; or its disposal under the particular law was prohibited by statute, as in the case of Burfenning; or had previously been disposed of, as in Stoddard *v.* Chambers and Easton *v.* Salisbury; or had issued for a greater quantity of land than the law allows, as in Patterson *v.* Winn; or for want of any entry, as in Polk's Lessees *v.* Wendall; or because the patent did not conform to the entry but issued for lands not authorized by the entry and actually prohibited, as in the case at bar. It is the want of authority for the issuance of the patent that renders the act invalid, whether it was prohibited by a decision of the land department in the proper exercise of its jurisdiction, or where it is issued for lands in reservations, or for lands over which the public surveys have not been extended.

In Polk's Lessees *v.* Wendall, it was held that the want of an entry nullifies the patent, applying the rule that a patent is void if the officer had no authority to issue it. In that case the law under which the patent issued provided for the appointment of an entry taker and established rules for making entries in his office. It was held that if there was no entry to justify the patent, there was no authority to issue it. There was no entry in this case as to the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, hence the patent was issued without authority of law.

In Patterson *v.* Winn the court said: "We may, therefore, assume as the settled doctrine of this court, that if a patent

is absolutely void upon its face, or the issuance thereof was without authority, or was prohibited by statute, or the State had no title, it could be impeached collaterally in a court of law in an action of ejectment."

In Smelting Co. *v.* Kemp (104 U. S., 644) the court, explaining what is meant "when we speak of a patent being void on its face," said: "It is meant that the patent is seen to be invalid either when read in the light of existing law, or by reason of what the court must take judicial notice of." The court then mentions several of the many instances in which a patent would be void although its invalidity is not shown from the recitals in the patent itself, as where the land was reserved from sale, or for an unauthorized amount, etc. "*Nor is the doctrine of the conclusiveness of a patent inconsistent with the right of a party resisting it to show, if an entry is not stated in the instrument, that no entry of the land was made as an initiatory proceeding, where a statute, as was the case in North Carolina, mentioned in Polk's Lessees v. Wendall, declares that proceedings for the title, when such entry has not been made, shall be adjudged invalid.*" (1 age 647.)

If resort may be had to the record to ascertain whether there was an entry to authorize the issuance of a patent, it may with equal propriety be resorted to for the purpose of ascertaining whether the patent conforms to the entry upon which it purports to have issued.

The act of June 3, 1878, provides the mode by which title to lands chiefly valuable for timber may be acquired. The act requires that an entry must be made as an initiatory proceeding, and the approval of such entry for patent by the Commissioner of the General Land Office is essential to the validity of the title. It is the judgment of the land department awarding the right to a patent that vests in the entryman whatever right he has, and the patent must rest upon and conform to that entry. It can not lawfully issue until the right to a patent has become perfect, or for land not authorized by the judgment upon which the right to a patent was predicated.

The court below held that this case is controlled by the principle announced in the case of United States *v.* Schurz (102 U. S., 378), which it construed as holding that after a patent has been signed, sealed, countersigned, and duly recorded, the patentee has a right to the patent, which he may enforce by mandamus, irrespective of whether the patent did or did not conform to the entry.

No such decision was made by the court in that case. What the court decided was that manual delivery of a patent is not essential to pass the title where it is issued in conformity with a decision by the officers of the land department that the patentee was entitled to a patent for the land described therein. It held that "*when upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands*" subject to such disposal, and a patent had issued in conformity with that determination, the land department is without authority, and can not arbitrarily withhold the patent for the purpose of reviewing its decision. Whether the entryman was entitled to a patent for the land entered "was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously the patent may be voidable but not absolutely void" (p. 401). That is not this case.

There is nothing in the decision to indicate that the court intended to apply that rule in a case where the patent had not issued in conformity with the decision of the land department upon which the right to a patent is founded. It was considering solely the right of a patentee to possession of the instrument where the officers of the land department *have decided in his favor*, and nothing remains but to perform the ministerial duty of carrying into effect such judicial determination.

In that case the land department had decided that McBride was entitled to a patent for the land and a patent

was issued strictly in conformity with that decision. The court said that the Department could not withhold the patent for the purpose of reviewing its decision. In this case the land department had decided that Cartford was not entitled to the land in question, and the patent was withheld, not for the purpose of reviewing its decision, but to correct a clerical error in the performance of a ministerial act, for the purpose of conforming the patent to the decision. That distinction, which should have been recognized by the court below, is readily observed, especially when viewed in the light of the decision of the Supreme Court in Bell *v.* Hearne (19 How., 262), where the right of the Secretary to correct errors in the issuance of a patent is said to be a necessary power in the administration of the Department.

In that case the plaintiff, John Bell, had purchased a tract of land and received final receipt and certificate, but the register of the local land office in making up his duplicate certificate to be returned to the General Land Office inserted the name of James Bell for that of John Bell. A patent was accordingly issued in the name of James Bell and was transmitted to the local land office for delivery, where it remained from 1844 to 1849. In the meantime the land was levied upon as the property of James Bell and was sold at sheriff's sale under a valid judgment and execution against James Bell. The defendant Hearne claimed title through mesne conveyances from the purchaser at that sale. In 1849 the patent was delivered to John Bell, who sent it to the General Land Office with his final receipt, and the Commissioner, upon representation of the facts, canceled the patent and issued a new patent to John Bell.

The court, after stating that "the certificate of purchase which contains the name of James Bell is found in the General Land Office," said:

> Whatever appearance of a title he had is owing to the mistake in the duplicate certificate returned to the General Land Office, and the patent issued in his

> name. But this patent was never delivered to him. The question then arises, had the Commissioner of the General Land Office authority to receive from John Bell the patent erroneously issued in the name of James Bell, and to issue one in the proper name of the purchaser? And the question, in our opinion, is exceedingly clear. The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud, in the important and extensive operations of that officer for the disposal of the public domain. The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department. Our conclusion is, that the supreme court of Louisiana erred in denying the validity of this title, and in conceding any effect or operation to the certificate of purchase or patent issued in the name of James Bell, as vesting a title in a person bearing that name.

In Bell's case there was some semblance of authority for the issuance of the patent, to wit, the duplicate certificate in the General Land Office in the name of James Bell, known as the patent certificate which the patent is supposed to follow. In Cartford's case there was none. There is not a paper in the record which purports to authorize its issue. In Bell's case the court said the patent had not been delivered, evidently for the reason that there was no authority for its issuance. If the signing, sealing, countersigning, and recording of the patent in that case was not effective as delivery, how could it be effective in this? These are of the class of cases referred to in the Schurz case where the court stated that all the acts up to and including the recording of the patent may have been performed, "and yet the officer in possession of the patent be not compellable to deliver it to the grantee. If for instance * * * by some clerical mistake the intention of the officer performing an essential part in the execution of the patent has been

frustrated." The distinction is thus drawn by the court itself, without which it is impossible to reconcile the ruling in the two cases.

In the Schurz case, the patent, conforming to the record that authorized its issuance, conveyed the title. In the Bell case, the patent did not conform to the record, and therefore conveyed no title. The Commissioner was justified, say the court, in correcting the clerical mistake by destroying the patent and issuing one to conform to the record. Where is the distinction between Bell's case and Cartford's?

Geo. H. Woodruff
Asst Atty Gen'l

E. F. Best
Asst Atty in Charge

Court of Appeals, District of Columbia.

APRIL TERM, 1908.

No. 1871.

No. 10, SPECIAL CALENDAR.

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vs.

THE UNITED STATES OF AMERICA ON THE RELATION OF BENJAMIN H. CARTFORD.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the District of Columbia awarding a writ of mandamus against the respondent, James Rudolph Garfield, Secretary of the Interior, the appellant herein, commanding him to deliver or cause to be delivered to the relator, Benjamin H. Cartford, the patent executed by the President of the United States on the 19th day of November, 1903, conveying to the relator title in fee simple in and to the north half of the northeast quarter and the east half of the northwest quarter

of section 6, in township 25 south of range 6 west of Willamette meridian, in the State of Oregon. This judgment was rendered after a demurrer to the respondent's answer or return had been sustained, on his election to stand on his answer as filed. The petition was filed on December 10, 1907, and the respondent's answer on January 3, 1908.

The facts as stated in the answer and those set out in the petition and not denied in the answer will now be given. The relator, having all the qualifications required by the laws of the United States to entitle him to make an entry of 160 acres of the public lands, under the act of Congress known as the "Timber Land act," approved June 3, 1878, filed with the land officers at Roseburg, Oregon, on February 28, 1903, his timber land sworn statement for the 160 acres of land above described. It is claimed in the petition that said land had, prior to the making of relator's said entry, been surveyed, the corners marked, and a plat including the same prepared and filed in the General Land Office (R., 2).

The answer denies that *all* of said lands were surveyed public land, and says the east half of the northwest quarter of said section 6 was unsurveyed and not subject to entry under the act of June 3, 1878, as said act provides only for the sale of surveyed public lands (R., 8). None of the land was included within any military, Indian, or other reservation of the United States and was valuable chiefly for timber, and unfit for cultivation. It was of the character of land authorized to be disposed of by said act of Congress.

It is not alleged in the petition that the land was what is known as "unoffered" land, because that provision of the Timber Land act was abolished by the act of May 18, 1898 (30 Stat., 418). The relator published the required notice, made the required proof, and paid for said 160 acres of land $2.50 per acre (the lawful price), amounting in all to $400, besides the required fees, and cash certificate No. 11,309 was issued to him for said land on July 13, 1903, by the said local land officers (R., 2 and 9). The proof and papers per-

taining to the relator's entry were forwarded by the local land officers to the Commissioner of the General Land Office, and the relator was required by the Commissioner to show cause why this entry should not be canceled as to the 80 acres described as the east half of the northwest quarter of said section 6, on the ground, as alleged by the Commissioner, that said land was unsurveyed (R., 2).

The records of the local land office at Roseburg, Oregon, showed the tract in question to be fully surveyed, and that all the interior lines had been run. It appeared later that the official plat in the General Land Office did not correspond with the plat in the local land office, in that two vertical lines, which would render the 80 acres in question entirely surveyed, appeared on the plat in the local land office and not on the plat in the General Land Office (R., 12). The entry as to the said 80 acres was canceled by the Commissioner, who was, on appeal, sustained by the Secretary of the Interior.

On July 11, 1906, the Secretary of the Interior in denying the relator's motion for review, held that inasmuch as the relator's good faith appeared, he would be allowed to relinquish his entry as to the part held intact and make a new entry for 160 acres of land under the aforesaid act of June 3, 1878 (R., 2, 7, and 14).

Afterwards, on October 9, 1906, the relator filed a relinquishment of his right to the east half of the northwest quarter of said section 6, without any consideration whatever, and on the same day applied for repayment of the purchase-money paid for said 80 acres of land. On September 21, 1907, the relator withdrew said relinquishment and application for repayment. The sum of $400, paid by the relator for the entire 160 acres of land, is still retained by the United States, and no portion thereof has been returned or offered to be returned to the relator (R., 2, 3, and 9).

The answer denies that repayment of the purchase-money was refused, but does not and could not say that it or any part of it had been returned or offered to be returned, though

the said application had been pending in the General Land Office over eleven months before it was withdrawn (R., 9).

A patent conveying to the relator in fee simple the 160 acres of land embraced in his entry described above was, on November 19, 1905, duly signed by the President, Theodore Roosevelt, by F. M. McKean, his Secretary, and countersigned by C. H. Brush, Recorder of the General Land Office, and sealed with the seal of the General Land Office, and duly recorded in Book 158, at page 171, of the land records of the General Land Office. The patent was in all respects executed signed, countersigned, sealed, and recorded as required by the laws of the United States. The patent was afterwards, on December 13, 1905, transmitted by the Commissioner of the General Land Office to the local land officers at Roseburg, Oregon, with instructions to deliver the same to the relator, and the patent was received by said local officers.

On December 28, 1906, the local officers returned the patent to the Commissioner of the General Land Office without having delivered or offered to deliver the same to the relator and without notifying him of its issue. The patent is now in the Department of the Interior and subject to the control of the respondent (R., 3 and 10). A copy of the patent was annexed to the petition and appears in the record at pages 5 and 6.

The relator first learned that the patent had been issued on April 5, 1907. He then made a demand on the respondent for the delivery to him of said patent or a certified copy thereof. The relator filed the receiver's duplicate receipt with the respondent when he made such demand. On August 27, 1907, the Commissioner of the General Land Office refused to deliver the patent or a ceretified copy, and directed that the patent and its record be canceled and a new patent for but one-half of said land be issued and delivered to the relator. The relator protested against said decision and appealed therefrom to the respondent, the Secretary of the Interior. The respondent on October 19, 1907, affirmed

said decision, and allowed the relator thirty days in which to relinquish to the United States his title to the north half of the northeast quarter of said section 6, and upon his failure to do so the respondent directed the cancellation of the patent and its record. On November 15, 1907, the relator filed with the respondent a motion for review of his said decision. On November 29, 1907, the relator notified the respondent of his refusal to relinquish his title to said tract of land. On December 7, 1907, said motion for a review was denied by the respondent (R., 3, 4, and 10).

The relator also claims in his petition that the official plat of survey covering the 80 acres of land in question was transmitted by letter "E" of December 5, 1906, of the Commissioner of the General Land Office to the local land office at Roseburg, Oregon, and ordered filed therein; that if the relator's patent be canceled the land embraced in his entry will become a part of the public lands of the United States, and be open to entry by any qualified person, and that no rights or claims of any other person have attached to said land or any part thereof. None of said matters are denied or negatived in any way by the respondent (R., 4). It will thus be observed that at and before the transmittal of the patent to the local officers at Roseburg, Oregon, for delivery to the relator, to wit, December 13, 1906, the land in question was surveyed land of the United States in every respect.

The relator then claims that the acts of the respondent in withholding his patent and directing the cancellation of the same and its record are without authority of law. That the patent having been executed and recorded as required by the law not only conveyed title in fee simple to the entire 160 acres of land mentioned therein, but also it terminated the jurisdiction of the Executive department of the Government over the land, and that the respondent has no power under the law to cancel the patent or to issue a new patent for the land or any part of it, and that the only lawful mode of avoiding the patent, if the facts were such as to require it, which the relator denies, is by judicial proceed-

ings to set it aside or to correct or reform it. As the respondent refused and still refuses to deliver the patent, the relator is deprived of the means of showing that title to the land or any part of it has vested in him, and as he is entitled to the possession of the patent and it is arbitrarily withheld by the respondent, and as he has no other adequate remedy, he prays for a writ of mandamus to require its delivery. On January 3, 1908, the relator demurred to the respondent's answer as setting forth no sufficient reason in law why the patent in controversy should not be delivered to him (R., 17). On January 31, 1908, the learned justice, before whom the demurrer was argued, filed a written opinion sustaining the demurrer (R., 18 to 23). On February 3, 1908, the formal order sustaining the demurrer was entered, and the respondent having elected to stand upon his answer, judgment awarding the writ of mandamus as prayed was rendered against him. The respondent appealed (R., 23).

POINTS AND AUTHORITIES.

I.

The patent in question is not wholly void.

The patent was executed by the proper officers of the Government and signed, countersigned, sealed, and recorded, as required by the laws of the United States (secs. 450 and 458, R. S. U. S.). This is admitted by the respondent. It purports to convey to the relator title in fee simple to the east half of the northwest quarter, and the north half of the northeast quarter of section 6, township 25 south of range 6 west of Willamette meridian, in the State of Oregon, containing 160 acres of land. (See copy of patent, pages 5 and 6 of the record.) That the east half of the northwest quarter of said section 6 was included in the patent through inadvertence and by mistake is also plain. But how can it possibly be maintained that the patent is void *in toto!* The north half of the northeast quarter of said section 6 was admittedly

surveyed and open to entry when the relator applied to enter the land, the land department meant to issue to him a patent for said tract of land, and a patent was issued to him for said tract, but by mistake another tract was also included in the patent. Is not this a familiar example of an error in expression which will be reformed or corrected by a court of equity? Can there be any doubt that such a mistake would and could only be corrected by a court of equity if the deed were one between private persons? The law on this subject is well known and not involved in doubt. In Cooke *vs.* Husbands, 11 Md., 492, it was held where the draughtsman was instructed to prepare a deed conveying a certain interest in property, and by mistake made it embrace a greater interest than the parties intended, a court of equity will upon proof of such mistake reform the deed. In The Green Bay & M. Canal Co. *vs.* Hewitt, 62 Wis., 316, it was held that a deed conveying by mistake the whole interest in a tract of land instead of a moiety, would be corrected by the reformation of the deed to accord with the intention of the parties. (See also Langdon *vs.* Keith, 9 Vt., 299; Parish *vs.* Complin, 139 Ind., 1; Critchfield *vs.* Kline, 39 Kas., 721; Perkins *vs.* Canine, 113 Mich., 72.) There is nothing startling about this proposition in cases between private persons. Could it be contended that after the delivery of a deed the party delivering it can cancel or reform the deed to correct a mistake therein? No; that requires the powers of a court of equity. Can any reason be perceived why a court of equity should not have like jurisdiction in the case of a mistake in a land patent? (It will be shown further on that delivery is not essential to pass title to lands conveyed by a Government patent.) Has the Secretary of the Interior ever been given the powers of a court of equity? No law giving him such powers can be pointed out. Were the deeds above referred to between private persons void because of similar mistakes in them to the mistake appearing in this patent? Courts of equity do not spend their time *correcting* or *reforming* void deeds. The most that could possibly be said about this

patent is that it is void as to 80 acres of the land embraced therein, but can that, even if true, give the Secretary of the Interior the powers of a court of equity as to cancellation and reformation? If the patent were void *in toto* it might, and would doubtless, be different. The Supreme Court in U. S. *vs.* Schurz, 102 U. S., 378 (which will be referred to more at length further on herein), intimates that the Secretary of the Interior might cancel a void patent, but said court expressly says (p. 401): "The mode of avoiding it (the patent) if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside, or *correct it if only partly wrong.*"

It was contended in the court below by the respondent that the final certificate, or receiver's final receipt, is the only basis of a patent, and if the patent do not follow the receipt the patent is void *in toto*. None of the judicial decisions cited by the respondent holds any such proposition. In Polk's Lessee *vs.* Wendell, 9 Cr., 87 (one of the cases cited by the respondent), it is held where the State has not title to the thing granted, or where the officer had no authority to issue the grant, it is void. This may be so, but in the case now before the court the United States did have title to the land, as it is admitted it was a part of the public domain, and the Land Department certainly had authority or jurisdiction to dispose of a part of the land embraced in the patent, and it is believed that it had jurisdiction over the whole of said land and that the patent cannot be held to be void even in part. This latter matter will be noticed further on herein. In Polk's Lessee *vs.* Wendell, 5 Wheat., 293 (cited by the respondent), it was said a grant raises a presumption that every prerequisite to its issuing was complied with, and a warrant is evidence of the existence of an entry, but where the entry has never in fact been made and the warrant is forged the grant is void. In the case now before the court the entry was in fact made and the final receipt or certificate was not forged. The certificate or receipt was perfectly valid. It was a receipt for $400 which

the relator actually paid for the 160 acres of land embraced in his entry (R., 16). The fact that the receipt was subsequently stamped cancelled or relinquished as to the "east half of the northwest quarter" certainly would not be the same thing as if no entry were made or the certificate forged. There was a perfectly valid and subsisting entry and there was no forgery about it. So it is with all of the judicial decisions cited by the respondent. *There is not one which holds that a patent conveying more land than the Land Department intended to convey is void, the proceedings being otherwise regular.* And it is believed the principles of law applicable to deeds between private persons, which contain mistakes, are applicable to the present case, as has been indicated above.

There was a case decided by the Secretary of the Interior, *In re* McLarty, 4 L. D., 498, which bears out the respondent's contention, but that case does not cite an authority to support it, and it is in conflict with U. S. *vs.* Schurz, 102 U. S., 378. It is certainly not an authority in any sense.

The respondent in his argument below contended that a patent was not a judgment, but was similar to an execution at law, and that if it did not follow the judgment, presumably in this case the decision of the Secretary of the Interior, it was absolutely void. This comparison appeared to appeal very strongly to the respondent. It is believed that the patent is more similar to a judgment than to an execution, as will be shown further on, and it is certainly the conveyance of the legal title. The respondent's idea of the law is incorrect even if the patent is the equivalent of or similar to an execution at law. This contention means in plain language that an execution which is for a sum larger than the judgment on which it is based or issued is absolutely void. In Miles *vs.* Knott, 12 Gill & J., 442, there was a judgment for $235.83, and the *fi. fa.* recited the judgment as for $295.83. A levy and sale were made under the writ. The court held that the failure to recite the judgment accurately

in the writ of *fi. fa.* did not render the process void, but only erroneous. (See also Harris *vs.* Alcock, 10 Gill & J., 226.)

It is believed, in any aspect of the case, the patent was not absolutely or wholly void.

II.

The patent, though issued by mistake, conveyed the legal title of the United States to the land embraced therein.

That this proposition is correct see Hughes *vs.* U. S., 4 Wall., 232. This was a suit brought by the United States to vacate a patent issued to Hughes and to compel its surrender for cancellation. One Goodbee applied to enter the land in question under the pre-emption law, he having previously inhabited and cultivated the tract. Subsequently Hughes entered the same tract at private sale. The land officers, *overlooking* the fact that the tract had been previously sold to Goodbee, gave Hughes the usual certificate of purchase and payment, upon which a patent was issued to him by the United States. The patent was issued by mistake and through inadvertence. It was held by the court that the patent conveyed title in fee simple to Hughes, and that it would be cancelled to permit the United States to fulfill its previous engagement to transfer title to Goodbee or his alienees. See also U. S. *vs.* Hughes, 11 How., 552, 568 (the same case), wherein it is said:

"As the patent to Hughes is a convevance of the fee, the United States stand divested of the legal title, and therefore cannot fulfill their engagement with Goodbee and his alienees, to whom they stand bound for a legal title, until the grant to Hughes is annulled."

See also U. S. *vs.* Schurz, 102 U. S., 378.
Germania Iron Co. *vs.* U. S., 165 U. S., 379.

Other authorities in support of the above proposition will be mentioned in the next section of this brief.

III.

Delivery of a patent is not essential to pass title, and when title from the United States has passed, the power of the Secretary of the Interior over the land and the patent is exhausted; and, if the patent was issued by mistake, the exclusive remedy of the United States is by proceedings in a court of equity, to have the patent set aside, or corrected or reformed.

The several matters of this proposition were all definitely and conclusively decided by the Supreme Court in U. S. *vs.* Schurz, 102 U. S., 378. This was a petition for a writ of mandamus filed in the Supreme Court of the District of Columbia to compel the delivery of a land patent. The lands claimed by the relator at the time of his entry were within the incorporated limits of the city of Grantsville *and were not subject to entry under the homestead law.* Without knowledge by the register of the local land office that the tract was within those limits, the relator's entry was admitted. Application was made to have the entry canceled as illegally and improvidently allowed, which application was duly forwarded by the register to the Commissioner of the General Land Office. Prior to regular action thereon a patent was prepared *through oversight and by mistake* and signed, sealed, and recorded, and transmitted to the local officers for delivery to McBride, the relator. Afterwards, upon taking up the record for examination, the Commissioner discovered that said patent had been improvidently prepared and transmitted and ordered its recall. It was thereupon returned by the register, no demand having been made for its delivery at the date of the receipt of the Commissioner's instruction. Upon examination of the record of contest the claim of McBride to the land was rejected by the

Commissioner, which rejection was on appeal by the relator affirmed by the Acting Secretary of the Interior, and afterwards by the respondent, the Secretary of the Interior, on review. The undelivered patent was then regularly cancelled, together with the entry upon which it was based. The Supreme Court of the United States directed the writ of mandamus to issue to compel the delivery of the patent, and *held* that delivery of a patent is not essential to pass title; that when a patent has been issued the power or jurisdiction of the Executive Department of the Government over the patent and the land covered by it is exhausted, and that the mode of avoiding the patent is not by arbitrarily withholding it, but by judicial proceedings to set it aside or *to correct it if only partly wrong*. The great similarity between the facts in the Schurz case and the case now before the court is apparent. They are almost identical. And it will also be borne in mind that in the Schurz case land was patented to the relator which was not under the law subject to the entry made by him, and which was granted to him through the oversight of the land officers as to what was disclosed by their records—that is, that said land was included within the limits of a townsite, and that a protest was pending against the entry on this ground at and before the time the patent was issued. In the present case the land, or rather one-half of it, according to the opinion of the Secretary of the Interior, was technically unsurveyed land, and therefore not subject to entry under the timber-land act, and a patent for the whole tract was issued through the oversight or mistake of the land officials as to the fact apparent from their records that one-half of said land was technically unsurveyed.

The respondent contends that cases of mistake such as appears in this case were excepted by the Supreme Court in its decision of the Schurz case. *To read the decision so would be to wipe it out altogether.* The quotation from this decision in the respondent's brief, it is believed, is not full enough to give a proper idea of what the court said on this

subject. That portion of the decision reads as follows (p. 403):

"The acts of Congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer, called the recorder, is appointed to make and keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction—the legally prescribed act which completes what Blackstone calls 'title by record'; and when this is done, the grantee is invested with that title.

"We do not say that there may not be some cases where all this has been done, and yet the officer in possession of the patent be not compellable to deliver it to the grantee. If, for instance, the secretary whom the President is authorized by law to appoint to sign his name to the patent should do so when he has been forbidden by the President, or if, by some mere clerical mistake, the intention of the officer performing an essential part in the execution of the patent has been frustrated. It is not necessary to decide on all the hypothetical cases that could be imagined.

"But we are of opinion that when all we have mentioned has been consciously and purposely done by each officer engaged in it, and where these officers have been acting in a matter within the scope of their duties, the legal title to the land passes to the grantee, and with it the right to the possession of the patent."

It is thus apparent that the court was referring to mistakes on the part of an officer in *executing* or *recording* the patent. There was no mistake on the part of any officer who executed or recorded the patent in the case now before the court. They meant to do precisely what they did. The mistake or inadvertence was in *overlooking* what their records showed. It was the same kind of mistake as was made in the Schurz case. It will be remembered that the patent in said case was issued by mistake and inadvertence; that it would not have been issued if the officers executing it had been aware of the condition of the records of the General Land Office—that is, that there was a protest pending against the entry; that the

land was not subject to the entry made by McBride, and that the Land Department had no right under the law to patent the land to the entryman. It will also be noticed that the Supreme Court in the same case (U. S. *vs.* Schurz, 102 U. S.), on page 404, makes the following important holding:

"On the other hand, when he obtains the possession (of the patent), if there be any equitable reason why, as against the Government, he should not have it—if it has been issued *without authority of law*, or by *mistake of facts*, or by fraud of the grantee—the United States can, by a bill in chancery, have a decree annulling the patent or possibly a writ of *scire facias*."

The case of Bell *vs.* Hearne, 19 How., 262, and other cases based thereon were cited against the contentions made by the relator in the court below; but it will be noted that said cases were decided on the theory that delivery of a patent is essential to pass title, the same as with a deed between private persons. The Supreme Court seemed to be under this impression certainly up to the time the case of Moore *vs.* Robbins, 96 U. S., 530, was decided, which case is well worth careful consideration. If delivery of a patent were essential to pass title, then the respondent could cancel an undelivered patent. Why? Because it was an incomplete instrument and never took effect. In other words, it was not a deed. But such contention is certainly concluded by the decision in the Schurz case.

It will also be noticed that the Bell case and the other cases based thereon were decided prior to October, 1880, when the decision in the Schurz case was announced. The Attorney-General himself, in his argument in the Schurz case, when speaking of the Bell case and the other similar cases, said they only could have been so decided on the theory that delivery of a patent was essential to pass title. (See U. S. *vs.* Schurz, 102 U. S., at page 389.)

The principles decided in the Schurz case were ratified, confirmed, and followed by the Supreme Court in Bicknell

vs. Comstock, 113 U. S., 149. Mr. Justice Miller, who delivered the opinion of the court, said (p. 151):

"It is admitted that on the first day of May, 1869, a patent in due form was executed by the President of the United States, conveying the said Bicknell said lots 3 and 4, which patent was duly recorded in the General Land Office, on the same day, at Washington, D. C., and thereupon the original was transmitted to the U. S. Land Office at Fort Dodge, Iowa, for said Bicknell. In June, 1878, the Commissioner of the General Land Office ordered a return of the patent to his office, and thereupon tore off the seal and erased the President's name from said patent, and mutilated the record thereof in the General Land Office, all without the consent and against the protest of the grantee of said Bicknell. That this action was utterly nugatory and left the patent of 1869 to Bicknell in as full force as if no such attempt to destroy or nullify it had been made, is a necessary inference from the principle established by this court in the case of U. S. *vs.* Schurz, 102 U. S., 378. That principle is that when the patent has been executed by the President and recorded in the General Land Office, all power of the Executive Department over it has ceased. *It is not necessary to decide whether the patent conveyed a valid title or not. It divested the title of the United States*, if it had not been divested before, so that Bicknell, or his grantee, being in possession under claim and color of title, the statute of limitations began to run in their favor."

To the same effect is *In re* Emblem, 161 U. S., 52, wherein the court says (p. 56):

"The determination of the contest between claimants of conflicting rights of preëmption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the Land Department, and cannot be controlled or restrained by mandamus or injunction. After the patent has once issued, the original contest is no longer within the jurisdiction of the Land Department. The patent conveys the legal title to the patentee, and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States."

IV.

The Land Department of the Government had the power to enter upon the inquiry as to whether the eighty acres of land in question were surveyed, and consequently it had jurisdiction, and having jurisdiction, the patent, even as to said eighty acres of land, is not void; and it is the issue of patent which is the final determination in favor of the patentee.

That the survey of public lands is under the jurisdiction of the Land Department, see sections 2395-2413, R. S. U. S.; and that the Land Department exercises the power to determine whether lands are surveyed, see the decisions attached to the respondent's answer (R., 12 to 17), and see paragraph 8 of said answer (R., 10 and 11). Appellant's brief, on page 3, also contains authorities in support of the proposition.

It was said by the Supreme Court in *Ex parte* Watkins, 7 Pet., 568, at page 572:

"The jurisdiction of the court cannot depend upon its decision upon the merits of the cause brought before it, but upon the right to hear and decide at all." (See also Grignon's Lessees *vs.* Astor, 2 How., 338.)

As the Land Department had the power to decide whether the public surveys had been extended over the 80 acres of land in controversy, it had jurisdiction over the land, and the patent cannot be said to be void even in part. The distinction between void and voidable patents, as depending upon jurisdiction, is well and fully considered in U. S. *vs.* Winona & St. P. R. Co., 67 Fed., 948, wherein the court says (p. 957):

"Another striking illustration of this distinction is found in Doolan *vs.* Carr, 125 U. S., 618, 630, and Quinby *vs.* Conlan, 104 U. S., 420. In the former case the plaintiff,

Carr, brought ejectment in reliance upon a title derived from a patent issued to the Central Pacific Railroad Company in 1874 under the Pacific Railroad acts. Those acts excepted from their grants to the railroad company the land claimed under Mexican or Spanish grants. By the act of March 3rd, 1851 (9 Stat., 632), a commission had been created to determine the extent and validity of such claims under Mexican grants. An appeal was allowed by that act from the decision of the Commission to the district court of California, and from the decision of that court to the Supreme Court of the United States. The land patented to the Central Pacific Railroad Company in that case was within the limits of a claim under a Mexican grant, which was in litigation before some of these tribunals when the grants were made to the Central Pacific Railroad Company, and when the line of its railroad was definitely fixed, and the claim under the grants was finally sustained by the Supreme Court long after those dates. The jurisdiction to hear and determine the claim to this land under the Mexican grant had been conferred by the act of Congress *upon tribunals other than the Land Department*, and the court held that the patent to the railroad company issued by that department was absolutely void, and its action in the premises without jurisdiction or authority. But in Quinby *vs.* Conlan (an action of ejectment) the patent under which the plaintiff claimed was attacked by an attempt to show that the land was within a reservation under a Mexican grant when the rights of the preëmption were initiated. The determination of that question depended upon whether or not *the public surveys had been extended over the land*, and whether or not other land had been taken by the claimant under the Mexican grant in satisfaction of it. The Supreme Court held that *the patent was a conclusive determination of this question*, and could not be collaterally attacked, because 'the question whether the land had been so freed from the reservation under the Mexican grant as to be open to settlement and preëmption depended upon matters disclosed by records of proceedings in the Land Department,' *and that department had the jurisdiction to determine those questions.*"

And on page 959, in the same case (U. S. *vs.* Winona & St. P. R. Co., 67 Fed., 948), the court said:

"It is not difficult to determine whether the certificates issued in this case were void or voidable when tested by these rules. Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. The test of jurisdiction is whether the tribunal has the power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong (Foltz *vs.* Railway Co., 8 C. C. A., 635; 60 Fed. Rep., 316, 318, and cases cited)".

And in the same case (U. S. *vs.* Winona & St. P. R. Co., 67 Fed., 948) the court says, at page 955:

"A patent issued by the officers of the Land Department of the United States, in a case within the *scope* of their power or jurisdiction, is dual in its effect. It is an adjudication of those officers that the patentee is entitled to the land under the laws of the United States, and it is a conveyance of title to that land to the patentee."

See also New Dunderberg Min. Co. *vs.* Old, 79 Fed., 598; Germania Iron Co. *vs.* U. S., 165 U. S., 379, 383, and U. S. *vs.* Schurz, 102 U. S., 378, 401.

Whether the issue of patent is a judicial or a ministerial act would seem to be not particularly important; for there can be no doubt that the execution and recording of the patent are the final acts of the officers of the Government for the transfer of its title. And if it be held that these acts are ministerial and in effect similar to an execution at law, the patent would not be void, even as to the eighty acres of land in controversy, but only erroneous, as is shown in section 1 of this brief.

In view of the argument made in the court below as to the potency and effect of the final certificate, or receiver's receipt, it might not be entirely out of place to interpolate here what the Supreme Court has to say on this subject in the recent

case of U. S. *vs.* Detroit Lumber Co., 200 U. S., 321. Mr. Justice Brewer, who delivered the opinion of the court, says (on page 338):

"Indeed, in some of the opinions of this court, emphasizing the value of a receiver's receipt, there are expressions which seem to underestimate the significance of a patent (Wisconsin Central R. R. Co. *vs.* Price County, 133 U. S., 496, 510; Deseret Salt Co. *vs.* Tarpey, 142 U. S., 241, 251). For it must be remembered that the latter is the instrument which passes the legal title, and that until it is issued the legal title remains with the Government and is subject to investigation and determination by the Land Department (Barden *vs.* Northern Pacific R. R. Co., 154 U. S., 288, 326; Michigan Land & Lumber Co. *vs.* Rust, 168 U. S., 589, 592; Guaranty Savings Bank *vs.* Bladow, 176 U. S., 448)."

V.

There was no uncertainty concerning the identification of the precise tract of land conveyed by the patent; and the patent is not void, even if all the lines including said tract were not run, as sufficient data was given to enable the land to be marked out with certainty.

It is alleged in the petition that the entire 160 acres of land embraced in the relator's entry had, prior to the making of his entry, been surveyed, the corners marked, and a plat including the same prepared and filed in the General Land Office (R., 2), and the petition also alleges that on December 5, 1906, the official plat of survey was transmitted to the local land office at Roseburg, Oregon, and ordered filed therein (R., 4). These matters are not denied. The answer merely says *all* of said land was not surveyed land, the east half of the northwest quarter being unsurveyed land, meaning, of course, that as the plat of survey had not been filed in the local office at the time relator's entry was made, said

eighty acres were therefore technically unsurveyed. But the answer does not deny that the land had actually been surveyed, the corners marked, the plat prepared and filed in the General Land Office; and it does not deny that on December 5, 1903, the plat having been filed in the local land office the land then became surveyed land in every sense of the word, and open to entry. These allegations must therefore be taken as true. The law applicable to this point of pleading is certainly well settled.

In U. S. *vs.* Bayard, 5 Mackay, 428, it was held that the return by a defendant in mandamus must deny with distinctness and certainty the material averments of the petition; otherwise they will be taken as true, and that the same applies to an insufficient answer. (See also Chicago & A. R. R. Co. *vs.* Suffern, 129 Ill., 275; People *vs.* Crabb, 156 Ill., 155; People *vs.* Ovenshine, 41 How. Pr., 164, and State *vs.* Kellogg, 95 Wis., 672.)

Thus it is apparent that the entire tract at the time of entry was actually surveyed, the corners marked, and the plat prepared, and was surveyed land in every sense when the patent was transmitted for delivery, on December 13, 1906. There can, then, be no doubt that the entire tract of land embraced in the patent was capable of precise identification.

Moreover, it will be remembered that the plat in the local land office at the time the entry was made showed the entire tract to be entirely surveyed. See Exhibit "A," annexed to the respondent's answer (R., 12) and made a part thereof, wherein it appears that the local land officers at Roseburg, Oregon, "by letter of August 25, 1904, stated that the records of their office showed the tract in question to be fully surveyed, all the interior lines having been run * * *;" and it further appears in said exhibit that the plat in the said local land office showing the land to be fully surveyed was approved October 30, 1860. It also appears that there were two vertical lines on the plat in the local office marking out the west half of section 6, which did not appear on the plat

in the General Land Office (R., 12). So, even if the plat in the General Land Office be correct, there can be no doubt of the precise identification of the entire tract embraced in said patent, because of the rectangular method of surveying required by law. (See R. S. U. S., title 32, chap. 9.)

It is plain from said exhibit that the north, south, and east boundaries of the east half of the northwest quarter of said section 6 (the 80 acres in question) had been surveyed at the time the relator's entry was made, and that they appeared on the official plats in both the General Land Office and the local land office. To completely bound said tract it was only necessary to connect two sides of the rectangular subdivision by a straight line, thus making its western boundary. The location of said line was as definitely fixed as the other three sides of the rectangle in question; and to connect these two sides was a mere matter of protraction—to draw the line on the plat and not to do any work in the field.

In Bittle *vs.* Stuart, 34 Ark., 224, 227, it was held that the courts take judicial notice of the United States system of land surveys, with the base lines, meridians, townships, and ranges thereby established and the relative positions of the sections in the township. (See also Gooding *vs.* Morgan, 70 Ill., 275, 276; Brown's Lessee *vs.* Clements, 3 How., 650, 663.)

And that the courts have held sections to be fully surveyed when some of the lines were not actually run, see Kean *vs.* Roby, 145 Ind., 221. In this case some of the interior lines in sections 1 and 12, in township 37, were not actually run and a part only of the south line of section 12 had been run. The court held all of said sections were fully surveyed, because under section 2395, U. S. R. S., a sufficient survey of lands is made which runs parallel lines each way, at intervals of two miles, and makes a corner at each line at the end of every mile; and which is completed under section 2396, U. S. R. S., by running straight lines from the established corners to the opposite corresponding corners, and where no such opposite or corresponding corners have been

or can be fixed, by running from the established corners due north and south, or east and west, as the case may be.

VI.

The relinquishment and application for repayment, which were filed in the case and subsequently withdrawn, do not militate against the relator's right to the patent.

It will be remembered that the relinquishment was executed and filed in the Land department several months prior to the issue of patent. It merely relinquished the relator's right to the east half of the northwest quarter of said section 6 to the United States. *Subsequently* the United States, by its formal patent, conveyed the entire tract of 160 acres of land embraced in the relator's entry to the relator. That he has the legal title to the entire tract, notwithstanding the relinquishment, cannot admit of doubt. Besides, the relinquishment was made *without consideration* and it has been withdrawn. It is believed that it has no bearing on the case. The same applies to the application for repayment. The United States still has the $400 paid by the relator as the purchase money in full for the entire 160 acres of land embraced in his patent.

VII.

No court of equity, the only tribunal having the requisite authority, would set aside or reform the patent, no damage having resulted to the United States, there being no adverse or contesting claimants, and no fraud having been perpetrated by the relator.

It is believed that this matter cannot, on these proceedings, be inquired into by this court. But it can do no harm to call the court's attention to it. It will be remembered that the United States has received, and still retains, the $400, the full price for the entire 160 acres of land, under the act of June 3, 1878, and that the Secretary of the Interior found

the relator had acted in good faith. The relator was even authorized on his relinquishment of his entry in full, to make a new entry for 160 acres of land (R., 7 and 14). Courts of equity, under such circumstances, will not cancel the patent, there being no adverse right or claimants, which is also admitted. Said courts do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting mistakes which are followed by no loss or damage. (See U. S. *vs.* Central Pacific R. R. Co., 26 Fed. Rep., 479.) In all the cases in which courts of equity have vacated patent at the instance of the United States, it was because there was fraud, or, in cases of mistake, there were adverse rights or contesting claimants. (See Hughes *vs.* U. S., 4 Wall., 232; U. S. *vs.* Hughes, 11 How., 568; U. S. *vs.* San Jacinto Tin Co., 125 U. S., 273, 285; U. S. *vs.* Beebe, 127 U. S., 338; San Pedro Co. *vs.* U. S., 146 U. S., 120; Germania Iron Co. *vs.* U. S., 165 U. S., 379.

This case has been presented to the court on the theory that the Commissioner of the General Land Office and the Secretary of the Interior exercise supervisory control over the local land officers in proceedings under the Timber Land act of June 3, 1878, as in cases arising under the other public land laws; but the contrary has been held, and it is believed the court's attention should be called to decisions of United States court so holding. One of the cases referred to is Montgomery *vs.* U. S., 36 Fed. Rep., 4. This was a suit in the United States Circuit Court for the District of Oregon, under the act of March 3, 1887 (24 Stat., 505), to compel the *issue* of a patent. The complainant, Montgomery, made an entry of 160 acres of land under the Timber Land act of June 3, 1878, and paid the United States $400, the purchase price for said land. The entry was allowed by the register and receiver of the local land office, the necessary proofs were made, and on the payment of the purchase price the receiver's certificate or receipt was issued therfor. The Commissioner of the General Land Office re-

fused *to issue* a patent for the land. The court held that it is not necessary that an entry under the Timber Land act should be ratified and confirmed by the Commissioner of the General Land Office, but it is the duty of such Commissioner, on receiving "the papers and testimony in the case" from the local land office, if it appears *prima facie* therefrom that the law has been complied with, to cause a patent to issue thereon to the purchaser. This holding was made because of the language employed in section 3 of said act, which is "on the transmission to the General Land Office of the papers and testimony in the case, a patent *shall* issue thereon." (See also Jones *vs.* U. S., 35 Fed. Rep., 561.) Both of these cases go much further than it would be necessary to go in the present case, as it is held the Commissioner will be required to *issue* a patent, and in the case now before the court it would only be necessary to hold that the Land Department should deliver a patent which has already been issued and recorded.

There can be no doubt from the record in this case, *prima facie*, at least, that the law had been complied with. The land was timber land, it was not within the limits of any reservation; the relator was qualified to make the entry; the entry was regularly made and allowed; the requisite proof was made; the lawful price was paid for the land; the receiver's receipt was issued therefor; and the records of the local land office showed the land to be surveyed. Moreover, the patent was actually issued and recorded.

It is believed, for the reasons hereinbefore fully set out, that the judgment of the court below awarding the writ of mandamus is right and should be affirmed.

Respectfully submitted,

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